

**ADEQ CWA SECTION 404 ASSUMPTION
ENDANGERED SPECIES ACT TECHNICAL WORKING GROUP
WHITE PAPER REVIEW**

Prepared for: Arizona Department of Environmental Quality

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I. INTRODUCTION

As part of their stakeholder engagement efforts, the Arizona Department of Environmental Quality (ADEQ) established technical working groups (TWGs) to address key areas of the Clean Water Act (CWA) Section 404 permit program. Each TWG developed a white paper summarizing the current state of CWA Section 404 permitting in Arizona, the ideal future state, and gaps that would need to be addressed to reach the ideal future state.

This memorandum provides a brief summary of the ideal future state identified by the TWG for the Endangered Species Act (ESA) and identifies any obvious challenges to ADEQ assumption.

2. WHITE PAPER REVIEW

2.1. IDEAL FUTURE STATE

The ESA TWG identified the ideal future state for the state 404 program as one that would allow ADEQ to provide protection for federally listed threatened and endangered species and critical habitat as described in the CWA Section 404(b)(1) guidelines, while also providing legal protection for applicants. In researching and evaluating methodologies to achieve these goals, the TWG identified a series of elements that may be used individually or in combination. These elements are described further here.

1. Memorandum of Agreement (MOA) – the MOA is an agreement between ADEQ and those federal agencies that may participate in or facilitate ESA consultation. In its simplest form, a MOA could be developed between ADEQ and the U.S. Fish and Wildlife Service (FWS) to allow ADEQ to seek guidance from FWS on CWA Section 404 permits that have the potential to adversely affect listed species or critical habitat. This process would not result in an incidental take permit for the applicant and could have the potential to restrict project development and require additional time and expense for project permitting. Projects without

incidental take coverage risk violation of the ESA if a take occurs. More complex MOAs may be developed in combination with other options described below.

2. Off-ramp to Section 7 Consultation – Under this scenario, an MOA between ADEQ, the EPA, and the U.S. Army Corps of Engineers (Corps) would be developed that allows for an option to secure a federal Section 404 permit from the Corps in the event that a project had the potential to result in the “take” of a listed species or adverse modification of critical habitat. While ADEQ would retain the permitting responsibility for most 404 permits, permit applications for projects with potential ESA compliance issues would be taken up by the EPA. The EPA or Corps would conduct the Section 7 consultation with FWS, and the Corps would issue or deny the permit post-consultation. The advantage of this approach is that it would allow an applicant to secure an incidental take permit without having to go through the typically more onerous and time-consuming Section 10 and Habitat Conservation Plan development process (see below). The TWG has concerns that this approach may constitute “partial assumption” of the 404 program, which is not allowed by federal regulation. However, the white paper provides an additional discussion by WestLand Resources, Inc. that lays out an argument that an off-ramp to a federal permit need not necessarily constitute “partial assumption” given that the EPA retains discretionary authority over the 404 program.
3. Habitat Conservation Plan (HCP) – In the absence of a federal nexus (e.g. a project that does not trigger a federal action) and an associated ESA Section 7 consultation, project proponents are still prohibited from “taking” a federally listed (animal) species and adversely modifying critical habitat. Section 10 of the ESA allows project proponents to consult directly with the FWS to secure an incidental take permit after developing an HCP. The TWG considered both project-specific HCPs as well as a statewide HCP, comparable to the Multi-Species Conservation Plan (MSCP) developed by Pima County. The primary concern with either HCP approach is the level of effort and time required to complete them. Reports from Texas indicate that project-specific HCPs regularly take two years or longer to complete, while Pima County’s MSCP was developed over the course of 20 years. The TWG suggests that having an ADEQ staff member act as a liaison between the applicant and the FWS may facilitate this process.

As noted above, these elements may be used in combination to address potential ESA issues associated with a state-administered 404 program, with attendant benefits and drawbacks.

A minority opinion put forward by the Sierra Club and the Maricopa Audubon Society suggests that because Arizona lacks state laws comparable to ESA and the National Environmental Policy Act (NEPA), and given some of the challenges described above, a state-administered 404 program would not provide protections for federally listed species comparable to a federal program. For that reason, they recommend that Arizona not assume the 404 program.

2.2. CHALLENGES

Addressing issues related to the ESA represents one of the more substantial challenges to Arizona's assumption of the 404 program. While HCPs are more common elsewhere, neither the agencies nor the regulated community in Arizona have much experience with the process and the TWG anticipates a significant learning period. Even with experienced agencies, project-specific HCPs still take two years or longer to get approved. In the absence of a consultation under Sections 7 (for federal permits) or 10 (for private actions), project proponents are prohibited from "taking" a federally listed species.

Although not identified in the ESA TWG white paper, ADEQ has heard from interested parties that ADEQ must find a way to provide incidental take coverage. This may be accomplished through the previously described ESA ideal future state elements of the state 404 permitting program. Providing incidental take coverage is not required by the state 404 assumption regulations, but is an identified need of the regulated community.

Developing a program that will provide adequate protection to federally listed species while providing reasonable legal protections to permittees will require close coordination between ADEQ and the federal agencies.